

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GUSTAVO REYES, ET AL.,

Case No. C-10-01667 JCS

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.

**ORDER DENYING MOTION FOR
REMAND TO STATE COURT AND
VACATING JULY 16, 2010 HEARING
[Docket No. 12]**

I. INTRODUCTION

Plaintiffs bring a purported class action on behalf of themselves and others who are similarly situated challenging Defendant Wells Fargo's mortgage practices relating to its distressed residential mortgage customers. Plaintiffs filed the action in California Superior Court on March 11, 2010 and Wells Fargo removed the action to federal court on April 19, 2010. In its Notice of Removal, Wells Fargo asserted that the action was subject to removal on the basis of diversity jurisdiction, pursuant to 28 U.S.C. § 1332(a). Presently before the Court is Plaintiffs' Motion for Remand to State Court ("the Motion"), in which Plaintiffs seek remand on the basis that Defendants have not satisfied the \$75,000.00 amount-in-controversy requirement for diversity jurisdiction. The Court finds that the Motion is suitable for determination without oral argument, pursuant to Civil Local Rule 7-1(b), and therefore **vacates the July 16, 2010 hearing**. For the reasons stated below, the Motion is DENIED.¹

II. BACKGROUND

A. The Complaint

In the Complaint, Plaintiffs allege that in 2003, they purchased property located at 1321 Grove Way, Hayward, CA 94541 ("Property"), where they reside, for approximately \$336,000.00.

¹The parties have consented to the jurisdiction of a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

1 Compl. ¶¶ 2, 8. Plaintiffs' first mortgage on the property was for \$268,000.00. *Id.* at ¶ 8. On or
2 about September 16, 2005, Wells Fargo refinanced the Property, providing Plaintiffs with a new loan
3 in the amount of \$452,000. 00 and taking a deed of trust as security. *Id.* at ¶ 9 & Ex. A (Deed of
4 Trust). Plaintiffs used the money they received on the refinance to make improvements on the
5 Property. *Id.* at ¶ 10.

6 By June 2009, the value of the Property had fallen to less than half of the loan amount and
7 Plaintiffs, due to economic hardship, were unable to make full mortgage payments. *Id.* at ¶¶ 10-11.
8 Plaintiffs called Wells Fargo to request a loan modification, but Wells Fargo denied the request. *Id.*
9 at ¶ 11. On or about September 10, 2009, Wells Fargo recorded and served a Notice of Default and
10 Election to Sell ("NOD"), electing to proceed with non-judicial foreclosure of the Property under
11 Section 2924 of the California Civil Code. *Id.* at ¶ 12 & Ex. B (NOD). Under Section 2924, the
12 recordation and serving of the NOD triggered a three month right-to-cure period before Defendant
13 could issue a Notice of Trustee's Sale establishing a foreclosure sale date on the Property. *Id.* In
14 the meantime, Plaintiffs continued to seek loan modification or some other form of relief. *Id.* at ¶
15 14.

16 On December 1, 2009, Wells Fargo offered Plaintiffs a Special Forbearance Agreement
17 ("Agreement"). *Id.* at ¶ 15 & Ex. C (Agreement). Under the Agreement, in exchange for monthly
18 payments of \$1,307.57, Wells Fargo agreed to: (a) suspend foreclosure activities for a three month
19 period, and (b) consider Plaintiffs' request for loan modification. *Id.* at ¶ 15 & Ex. C (Agreement).
20 Plaintiffs allege that they made the monthly payments required under the Agreement, making
21 payments for the months of December, 2009 through March, 2010, before learning they had been
22 foreclosed on. *Id.* at ¶ 16. Specifically, on December 11, 2009, Wells Fargo had recorded the
23 Notice of Trustee's Sale against the Property, and on February 19, 2010 the Property had been sold
24 by trustee's sale. *Id.* at ¶ 17 & Exs. D and E. The Property was granted and conveyed to Wells
25 Fargo Asset Securities Corporation. Compl. Ex. E ("the grantee herein WAS the foreclosing
26 beneficiary").

27 Based on these factual allegations, Plaintiffs assert the following five claims against Wells
28 Fargo: 1) breach of contract; 2) restitution (unjust enrichment); 3) unfair competition; 4) declaratory

1 relief; 5) injunctive relief. *Id.* at ¶¶ 26-43. With respect to the request for injunctive relief,
2 Plaintiffs ask the Court to enjoin Wells Fargo’s operations to ensure compliance with the Agreement
3 and to prevent Wells Fargo from “transferring rights in the unlawfully foreclosed properties.” *Id.* at
4 9. Plaintiffs assert their claims on behalf of themselves and a class of Plaintiffs that includes “all
5 California residential mortgage borrowers who made or tendered each of their monthly installment
6 payments to Wells Fargo pursuant to the Special Forbearance Agreement (or similar agreements)
7 during the four years proceeding [sic] the filing of this action.” *Id.* at ¶ 18.

8 **B. The Notice of Removal**

9 Wells Fargo removed this action to federal court on the basis of diversity jurisdiction. In
10 particular, in the Notice of Removal, Wells Fargo stated that: 1) as of the time the Complaint was
11 filed, there was complete diversity of citizenship among the parties; and 2) the amount in
12 controversy exceeds \$75,000.00. Notice ¶¶ 6, 19. In addressing the amount in controversy, Wells
13 Fargo states in the Notice of Removal that “[a]lthough Plaintiffs fail to plead a specific amount in
14 controversy, they assert a right to relief in the form of an injunction, damages, restitution, and
15 reasonable attorneys’ fees and costs of litigation.” *Id.* at ¶ 9. Wells Fargo goes on to assert that the
16 request for attorneys’ fees, by itself, is sufficient to satisfy the amount-in-controversy requirement.
17 *Id.* at ¶ 12. Wells Fargo relies, in part, on a declaration by William Stern, an expert on Unfair
18 Competition Law (“UCL”), stating that “a plaintiff who prevails on [a UCL claim], individually or
19 as a private attorney general, and subsequently moves for attorneys’ fees under Section 1021.5 of the
20 Code of Civil Procedure will *virtually always* receive a fee award in excess of \$75,000.00.”
21 Declaration of William L. Stern in Support of Wells Fargo’s Notice of Removal (“Stern Decl.”) ¶
22 12. In support of this statement, Stern cites to numerous decisions in UCL cases in which attorneys’
23 fees awards exceeded \$75,000.00. *Id.* at ¶ 9.

24 **C. The Motion**

25 In the Motion, Plaintiffs challenge Wells Fargo’s reliance on attorneys’ fees as a basis for
26 establishing the amount in controversy, asserting that Wells Fargo failed to take into account the rule
27 that attorneys’ fees sought by class members cannot be aggregated for the purposes of determining
28 the amount in controversy. Rather, Plaintiffs assert, a removing defendant must establish that each

1 plaintiff's pro-rata share of the attorneys' fees award will satisfy the amount-in-controversy
2 requirement. Plaintiffs further assert that many of the cases cited by Wells Fargo's expert to show
3 that attorneys' fees awards on UCL claims are misleading to the extent that they were decided prior
4 to Proposition 64, which amended the UCL to make clear that UCL private attorney general actions,
5 such as the one here, were to be treated like other class action claims, that is, as a collection of
6 separate and distinct claims by class members. Applying the proper standard, Plaintiffs assert, there
7 is no evidence showing that each plaintiff's *non-aggregated* attorneys' fees will meet the amount-in-
8 controversy requirement.

9 In its Opposition, Wells Fargo notes that Plaintiffs do not dispute that the parties are
10 completely diverse. Further, Wells Fargo reiterates its position that Plaintiffs' request for attorneys'
11 fees is sufficient to meet the amount-in-controversy requirement, citing both to awards in UCL
12 cases, and to awards arising out of contractual provisions in breach-of-contract cases. Wells Fargo
13 rejects Plaintiffs' assertion that cases decided before Proposition 64 are no longer relevant in
14 determining the likely amount of attorneys' fee awards in UCL private attorney general actions,
15 asserting that Proposition 64 merely changed the standing requirements for bringing such actions. In
16 addition, Wells Fargo asserts that the amount-in-controversy requirement is satisfied because the
17 Notice of Removal also cited to the injunctive relief sought by Plaintiffs as a grounds for removal.
18 Although the Notice of Removal did not contain any discussion of the facts relating to this assertion,
19 Wells Fargo argues, this reference is sufficient to show that the amount-in-controversy requirement
20 is met because it is evident from the complaint that the object of the litigation – Plaintiffs' foreclosed
21 home – is worth more than \$75,000.00. To the extent the Notice of Removal is deficient, Wells
22 Fargo contends, its Opposition to Plaintiff's Motion should be considered as an amendment to the
23 Notice.

24 In their Reply, Plaintiffs reject Wells Fargo's assertion that the Notice of Removal
25 adequately cited to the injunctive relief to show that the amount in controversy requirement was met.
26 Rather, Plaintiffs argue that this ground is entirely new and as such, should not be considered.
27 Further, Plaintiffs argue that their request for attorneys' fees does not satisfy the amount-in-
28 controversy requirement in this case.

III. ANALYSIS

A. Legal Standard

Pursuant to 28 U.S.C. § 1441(a), “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.” Section 1332(a), in turn, provides that “the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs,” and is between parties with diverse citizenship. 28 U.S.C. § 1332(a).

Under 28 U.S.C. § 1446(a), a notice of removal must contain “a short and plain statement of the grounds for removal.” 28 U.S.C. § 1446(a). Although a defendant's notice of removal “cannot be amended to add a separate basis for removal jurisdiction after the thirty day period” for removal has expired, *see ARCO Environmental Remediation, L.L.C. v. Department of Health and ARCO Environmental Remediation, L.L.C. v. Department of Health and Environmental Quality of Montana*, 213 F.3d 1108, 1117 (9th Cir. 2000), a defendant may amend the notice of removal after the thirty-day window has closed to correct a “defective allegation of jurisdiction.” *See* 28 U.S.C. § 1653; *see also* C. WRIGHT, A. MILLER & M. KANE, *Federal Practice & Procedure* § 3733 at 358 (3d ed.1998) (stating that after the thirty-day removal period notice may be amended “only to set out more specifically the grounds for removal that already have been stated, albeit imperfectly, in the original notice.”). Thus, in *Cohn v. Petsmart, Inc.*, the Ninth Circuit held that the district court did not err in construing defendant’s opposition to a motion to remand as an amendment to its notice of removal where the removing party only “summarily alleged” that the amount-in-controversy requirement was met without citing supporting facts. 281 F.3d 837, 840 n. 1 (9th Cir. 2002) (citing *Willingham v. Morgan*, 395 U.S. 402, 407 n. 3 (1969) (holding that “it is proper to treat the removal petition as if it had been amended to include the relevant information contained in the later-filed affidavits”)).

The party that seeks to remain in federal court has the burden of proof on a motion to remand to state court. *See Conrad Associates v. Hartford Accident & Indemnity Co.*, 994 F.Supp. 1196,

1 1198 (N.D.Cal.1998). The Ninth Circuit has held that “[t]he strong presumption against removal
 2 jurisdiction means that the defendant always has the burden of establishing that removal is proper.”
 3 *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988) (citations omitted). In cases in
 4 which a plaintiff’s state court complaint does not specify an exact figure for damages, the defendant
 5 must establish, by a preponderance of the evidence, that the amount in controversy exceeds the
 6 statutory minimum. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996)
 7 (holding that where amount at stake was not clear from allegations in the complaint, defendant
 8 seeking to remain in federal court has the burden “of actually proving the facts to support
 9 jurisdiction, including the jurisdictional amount.”).

10 **B. Whether Wells Fargo Has Demonstrated that the Amount in Controversy**
 11 **Requirement is Met**

12 Wells Fargo asserts that the amount-in-controversy requirement is satisfied on the basis of
 13 Plaintiffs’ request for attorneys’ fees *and* on the ground that the value of the injunctive relief sought
 14 by Plaintiffs exceeds the jurisdictional minimum. As a preliminary matter, the Court finds that the
 15 Notice of Removal cites to both requests as grounds for asserting diversity jurisdiction, even if it
 16 does so only summarily as to the request for injunctive relief. The Complaint clearly stated that the
 17 Plaintiffs sought injunctive relief to prevent the Defendant from “transferring rights in the
 18 unlawfully foreclosed properties,” Compl. at 9, and the Defendant’s Notice of Removal asserted that
 19 the Plaintiffs claimed a “right to relief in the form of an injunction.” Notice ¶ 9. Therefore, to the
 20 extent that the Notice of Removal may be deficient with respect to the allegation of jurisdiction
 21 based on Plaintiffs’ injunctive relief request, the Court may properly consider Wells Fargo’s
 22 Opposition to the Motion as an amendment to the Notice of Removal. Further, the Court finds, for
 23 the reasons stated below, that Plaintiffs’ request for injunctive relief is sufficient to establish the
 24 amount in controversy for the purposes of removal. Therefore, the Court declines to reach the
 25 question of whether Plaintiffs’ request for attorneys’ fees would, by itself, satisfy the amount-in-
 26 controversy requirement.

27 “In actions seeking declaratory or injunctive relief, it is well established that the amount in
 28 controversy is measured by the value of the object of the litigation.” *Hunt v. Wash. State Apple*

1 *Adver. Comm'n*, 432 U.S. 333, 347 (1977). If the primary purpose of a lawsuit is to enjoin a bank
 2 from selling or transferring property, then the property is the object of the litigation. *See Garfinkle*
 3 *v. Wells Fargo Bank*, 483 F.2d 1074, 1076 (9th Cir. 1973); *see also Cabriaes v. Aurora Loan*
 4 *Services*, 2010 WL 761081 *3 (N.D.Cal. Mar. 2, 2010) (holding that the object of the litigation was
 5 the property the plaintiff sought to enjoin the defendant from selling); *Henderson v. Nationstar*
 6 *Mortgage Company, LLC*, 2008 WL 302374 *1 (W.D.Wash. Jan. 31, 2008) (holding that the object
 7 of the litigation was the property the plaintiff sought to enjoin the defendant from selling at a non-
 8 judicial foreclosure sale); *Garcia v. Citibank, N.A.*, 2010 WL 1658569 *2 (E.D.Cal. Apr. 23, 2010)
 9 (holding that the object of the litigation was the property that plaintiff sought to enjoin the defendant
 10 from selling at future foreclosure proceedings). In *Garfinkle*, the defendant was proceeding with a
 11 non-judicial foreclosure on the plaintiff's property, and had issued a notice of default but had not yet
 12 sold the property. *Garfinkle*, 483 F.2d at 1076. The plaintiffs challenged the lawfulness of the non-
 13 judicial foreclosure procedure and sought an injunction prohibiting the bank from selling the
 14 property. *Id.* Reasoning that "the whole purpose of this action is to [prevent] the [bank] from
 15 selling [the] property," the court found the property to be the object of the litigation. *Id.*

16 Even if the property at issue has already been sold in foreclosure by the defendant, as is the
 17 case here, the property may still be the object of the litigation when the plaintiff sues for injunctive
 18 relief. *See Delgado v. Bank of America Corp.*, 2009 WL 4163525 *6 (E.D.Cal. Nov. 23, 2009). In
 19 *Delgado*, the plaintiff entered into a deed of trust with the defendant to secure its purchase of a
 20 home, then defaulted on its loan payments, and the defendant later sold the property in a non-judicial
 21 foreclosure proceeding. *Id.* at *2. The defendant had already sold the plaintiff's property when the
 22 plaintiff filed suit seeking damages, declaratory and injunctive relief, including an order to set aside
 23 the sale of the property. *Id.* The court ruled that the object of the litigation was the foreclosed
 24 property. *Id.* at *6.

25 The above cases support the proposition that regardless of whether the property at issue has
 26 been sold in foreclosure or is still held by the lender, the value of the property is the object of the
 27 litigation for the purposes of determining whether the amount-in-controversy requirement has been
 28 met so long as the plaintiff is seeking injunctive relief to prevent or undo the lender's sale of the

1 property. That is the case here. As noted above, as a result of the foreclosure sale, the Property has
2 been sold to Wells Fargo Asset Securities Corporation, apparently a division of Wells Fargo. *See*
3 Compl. Ex. E. In the complaint, Plaintiffs have requested an injunction to prevent Wells Fargo
4 from “transferring rights in the unlawfully foreclosed properties.” Compl. at 9. In other words,
5 Plaintiffs seek to prevent Wells Fargo from selling the foreclosed property to a third party.
6 Therefore, as a practical matter, the injunctive relief sought by Plaintiffs in this case is analogous to
7 the relief that was requested in *Henderson, Garcia, and Cabriaes*, in which the plaintiffs’ properties
8 had not yet been sold when the actions were initiated. Further, even if the entity that purchased the
9 Property in this action is a separate entity from Defendant Wells Fargo, the *Delgado* decision
10 supports the conclusion that the Property is, nonetheless, the object of the litigation.

11 The next issue is how to value the Property. In *Garfinkle*, the court held that the amount-in-
12 controversy requirement was satisfied because both the amount of the plaintiff’s indebtedness on the
13 loan and the fair market value of the property exceeded the statutory amount in controversy
14 threshold. *Garfinkle*, 483 F.2d at 1076. In the wake of *Garfinkle*, some district courts in the Ninth
15 Circuit have relied on the amount of indebtedness in foreclosure cases, *see, e.g., Henderson*, 2008
16 WL 302374 at *1; *Garcia*, 2010 WL 1658569 at *2, while others have looked to the fair market
17 value of the property to determine whether the amount-in-controversy requirement is met. *See, e.g.,*
18 *Delgado*, 2009 WL 4163525 at *6 (holding that defendants had met their burden regarding the
19 amount in controversy by submitting an affidavit claiming that an appraisal of the property exceeded
20 \$75,000.00.); *Cabriaes*, 2010 WL 761081 at *3.

21 Based on *Garfinkle* and its progeny, the Court concludes that the amount-in-controversy
22 requirement is satisfied in this case. Here, as in *Garfinkle*, the Court need not decide which method
23 of determining the value of the injunctive relief should be used because under either standard, the
24 amount-in-controversy requirement is satisfied. In particular, the Property was sold for \$220,000.00
25 at the trustee’s sale – a public auction; thus, the \$220,000.00 sale price is a fair assessment of the
26 current market value of the Property. Compl. Ex. E. Further, documents attached to the Complaint
27 indicate that the amount of unpaid debt on the loan at the time of the trustee’s sale was \$460,946.68.
28 *Id.* Therefore, either method of valuing the litigation puts this case over the \$75,000.00 amount-in-

1 controversy threshold. Further, the Court rejects Plaintiffs' assertion that the value of the injunctive
2 relief is merely the administrative cost of restructuring Plaintiffs' loan. Reply at 6. Plaintiffs have
3 cited no case law in support of this assertion. Nor have they addressed the body of case law
4 discussed above, in which courts have held that the proper measure of the value of injunctive relief
5 in similar actions challenging foreclosure is the value of the property subject to foreclosure.

6 Finally, to the extent that the Court finds that the named plaintiffs meet the amount-in-
7 controversy requirement, it also concludes that it has supplemental jurisdiction over the unnamed
8 class members, regardless of the value of the requested injunctive relief as to those class members.
9 *See Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 858 (9th Cir. 2001) ("we hold that if a named
10 plaintiff in a diversity class action has a claim with an amount in controversy in excess of \$75,000,
11 28 U.S.C. § 1367 confers supplemental jurisdiction over claims of unnamed class members
12 irrespective of the amount in controversy in those claims. . .").

13 **IV. CONCLUSION**

14 For the reasons stated above, the Motion is DENIED.

15 IT IS SO ORDERED.

16
17 Dated: June 29, 2010

18
19
20 
21 _____
JOSEPH C. SPERO
United States Magistrate Judge
22
23
24
25
26
27
28